

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No 155184

Court of Appeals No. 328246

-vs-

Lower Court Case No. 15-0181-01 -FC

RYAN LASHAWN CHATMAN

Defendant-Appellee.

Wayne County Prosecutor
Attorney for Plaintiff-Appellee

Gary David Strauss (P48673)
Attorney for Defendant-Appellee

**ANSWER TO APPLICATION FOR LEAVE TO APPEAL
PROOF OF SERVICE**

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STATEMENT OF JURISDICTION

The People filed this application seeking leave from the Court of Appeal's opinion reversing Defendant, Ryan Lashawn Chatman's, conviction.

This application should be denied because the Court of Appeals' opinion is not clearly erroneous, it does not conflict with other decisions by this Court or the Court of Appeals, and it will not cause material injustice. Further, this case does not present an issue of significance to the jurisdiction of the state. MCR 7.302(B).

COUNTER-STATEMENT OF QUESTION PRESENTED

- I. WAS THE COURT OF APPEALS CORRECT IN HOLDING THAT THE TRIAL JUDGE'S QUESTIONING OF WITNESSES CONSTITUTED PLAIN ERROR AND PIERCED THE VEIL OF JUDICIAL IMPARTIALITY WARRANTING REVERSAL OF DEFENDANT'S CONVICTIONS AND A NEW TRIAL?**

The People answer, "No."

Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS

Defendant - Appellee, Ryan Lashawn Chatman, was convicted of assault with intent to murder, discharge of a firearm in or at a building causing injury, felon in possession of a firearm and possession of a firearm during the commission of a felony. Mr. Chatman appealed his sentence and conviction. On December 6, 2016, the Michigan Court of Appeals held that the trial judge's questioning of various witnesses pierced the veil of judicial impartiality warranting reversal of the convictions and a new trial before a different judge¹. In reaching its decision, the Court of Appeals applied the standards set forth by this Court in *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015).

This case arose "from a shooting that occurred around 12:30 p.m. on November 21, 2014, at the home of Karla Mitchell at 12949 Penrod in Detroit." The Court noted that:

There were several undisputed facts elicited at trial. There was no dispute that the victim Kevin Lawless arrived at Mitchell's house around 8:00 a.m. to drink and play video games with defendant, Mitchell, and several other individuals—Michael "Mike" Grayson, Amanda Grayson, and Sharvell Elliot—who were also visiting Mitchell that day. It was also undisputed that some hours later, while in Mitchell's kitchen, Lawless and defendant began to argue. Further undisputed was that defendant had a gun, shot Lawless and fled Mitchell's home. (*Chatman*, slip opinion at 1).

The primary issue at trial was the divergent testimony with regard to the events that took place during the argument leading up to the shooting. Kevin Lawless:

testified that the shooting was preceded by an argument that started because defendant was "playing around with" a .9 mm semiautomatic and Lawless asked him to stop and put the gun away. Although Lawless explained that he and defendant were arguing with 10 feet between them, he said that at some point in the argument, defendant slapped him. Lawless did not remember if he retaliated in any way, but remembered that he had no weapons on him that day. Lawless testified that after the slap, defendant raised his gun, and aimed it at Lawless. Lawless again insisted that defendant was 10 feet away as Lawless raised his left hand to protect his face and defendant pulled the trigger. Lawless fell to the floor, and watched as defendant jumped over his body and ran out of Mitchell's house. (*Chatman*, slip opinion at 1).

Mr. Chatman testified at trial and denied that he had been playing with his handgun

¹ *People v Chatman*, unpublished opinion of the Michigan Court of Appeals, decided December 6, 2016 (Docket No. 328246)

at all that day. As noted by the Court of Appeals:

[a]ccording to defendant, once he and Lawless were alone, Lawless asked him to borrow money. Defendant testified that he refused, and Lawless, who was very intoxicated, became angry. Thereafter, a heated argument ensued, and Lawless shoved defendant. Defendant testified that he shoved Lawless back, and then Lawless grabbed a chair. Defendant said that when Lawless “charged toward” him with the chair raised, defendant pulled his handgun from his pocket and pointed it toward the floor. He explained that when Lawless tossed the chair toward him, it caused his arm to jerk back, and grab for the gun. Defendant testified that he had no intention to shoot Lawless, but had pulled the gun out because, although he had no particular reason to fear Lawless, Lawless had been acting irrationally and had threatened him with the chair. Defendant claimed that, during the struggle for the handgun, his finger pulled the trigger and the firearm discharged, shooting Lawless through the hand that had been reaching for the gun and in the side of the face. (*Chatman*, slip opinion at 1).

As will be addressed in detail below, the Court of Appeals focused on the trial judge’s questioning of the complainant, Kenneth Lawless, Reverend Fisher, an individual present in the Mitchell home during the incident, and Detective Bock, the fingerprint analyst that matched defendant’s fingerprints to those on the handgun. After analyzing the judge’s questioning of the witnesses and applying the standards set forth in this Court’s opinion in *Stevens, supra*, the Court held that:

The judge’s questioning was unnecessary, reinforcing and biased in favor of the prosecution. We conclude that the judge’s interference constituted plain error.

We also conclude that the plain error affected defendant’s substantial rights. Independent of defendant’s actual innocence, the judge’s questioning seriously affected the fairness of the trial.

* * *

Considering the factors enunciated in *Stephens [sic]*, the court’s questioning of Lawless demonstrated the appearance of advocacy for the prosecution. Considering the totality of the circumstances, we conclude that the judge’s questioning pierced the veil of judicial impartiality warranting reversal of defendant’s convictions and a new trial. (*Chatman*, slip opinion at 7-8)(citations omitted)

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE TRIAL JUDGE'S QUESTIONING OF WITNESSES CONSTITUTED PLAIN ERROR AND PIERCED THE VEIL OF JUDICIAL IMPARTIALITY WARRANTING REVERSAL OF DEFENDANT'S CONVICTIONS AND A NEW TRIAL.

A. Standard of Review and Issue Preservation

Mr. Chatman argued on appeal that he was deprived of a fair trial when the trial judge extensively questioned witnesses and exhibited bias against the defendant. Mr. Chatman's trial attorney failed to preserve this issue by objecting to the trial court's questions at trial. Thus, the Court of Appeals reviewed this issue for plain error. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). A plain error is one that is "clear or obvious," and the error must affect the defendant's "substantial rights." *People v Carines*, 460 Mich. 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *Id.* at 763–764 (internal quotations and alterations omitted).

B. Discussion

Both the due process guarantees of the Michigan and United States constitutions require fundamental fairness. Const 1963, art 1, § 17; US Const, Am XIV. A trial judge has broad discretion in managing the conduct of a trial. *People v Conley*, 270 Mich App 301, 307; 715 NW 2d 377 (2006). The judge may question a witness to clarify testimony or elicit relevant testimony. *People v Davis*, 216 Mich App 47, 50–51; 549 NW 2d 1 (1996). However, the judge must maintain a veil of judicial impartiality and not engage in conduct or make comments that might unduly influence the jury and deprive a defendant his right to a fair and impartial trial. *Conley*, 270 Mich App at 307.

In *People v Stevens*, *supra*, this Court addressed the appropriate standard for determining when a trial judge's conduct in front of a jury has deprived a party of a fair and

impartial trial. This Court stated that:

In order to provide clarity going forward, we thus propose a new articulation of the appropriate test, grounded in a criminal defendant's right to a fair and impartial jury trial. See [*People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957)]; *People v Bigge*, 297 Mich 58, 72; 297 NW 70 (1941) ("Once the door is open for allowing the opinion of the court to be impressed upon jurors that one charged with crime is guilty of the offense, the fundamental right of trial by jury is impaired."). A trial judge's conduct deprives a party of a fair trial if a trial judge's conduct pierces the veil of judicial impartiality. [*People v Wilson*, 21 Mich App 36, 37-38; 174 NW2d 914 (1969)]("If an examination of the record reveals that the veil of judicial impartiality was pierced by the trial judge, the case must be reversed."); *People v Bedsole*, 15 Mich App 459, 462; 166 NW2d 642 (1969) ("The veil of judicial impartiality should not have been pierced by the trial judge on this occasion."). A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. *Stevens* at 170.

This Court held that a proper inquiry requires a fact-specific analysis based upon the context of a given case and totality of the circumstances in order to determine whether the judge demonstrated the appearance of advocacy or partiality on the whole. In the present case, the Court of Appeals noted that:

the *Stevens* Court considered the issue of when judicial questioning constitutes conduct that pierces the veil of judicial impartiality and deprives a defendant of a fair trial:

A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality. A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial. [*Stevens* at 171]

Additionally, to ensure an appearance of impartiality, a judge should not only be mindful of the substance of his or her words, but also the manner in which they are said, and a judge should avoid questions that are intimidating, argumentative, or skeptical. (*Chatman*, slip opinion at 2-3, citing *Stevens* at 175).

The Trial Judge's Questioning of Kevin Lawless

After the prosecutor concluded his examination, the trial judge asked Mr. Lawless numerous questions, as set forth below.

THE COURT: Mr. Lawless, let me ask you a couple of questions, okay, but look at the jury while I'm asking you the questions if you will, all right. On the date that this incident happened, November 21, 2014, where did you come from when you went to Karla Mitchell's house?

THE WITNESS: My house.

THE COURT: Okay. And was anyone with you at your house before you went to Karla Mitchell's house?

THE WITNESS: No.

THE COURT: Now you've indicated that you've known Mr. Chatman for some period of time and you were friends, right?

THE WITNESS: Correct.

THE COURT: On this particular day when you went to Karla Mitchell's house, did you have any weapon on you? Did you have a gun, a knife, anything?

THE WITNESS: No.

THE COURT: Now you say that you were in the kitchen of this house and you were present, Mr. Chatman was present. Who else was present in the kitchen?

THE WITNESS: A guy named Mike, a young guy named Mike.

THE COURT: A young guy by the name of Mike, okay. Did Mike appear to you to have a weapon?

THE WITNESS: No.

THE COURT: So the only person that had a weapon in this kitchen was Mr. Chatman?

THE WITNESS: Correct.

THE COURT: Now you say that you had this argument with Mr. Chatman. I'm a little -- I don't fully understand as to how long this argument ensued. In other words, how long were you involved in this argument with Mr. Chatman? Was it just a couple minutes or was it like an hour or two?

THE WITNESS: No, it wasn't no hour or two. It was a couple minutes.

THE COURT: A couple minutes?

THE WITNESS: Yes.

THE COURT: And how did it escalate to the point to where he wound up slapping you? Did he slap you first or did --

THE WITNESS: Yes.

THE COURT: Okay. And when he slapped you, what were you saying to him? Had you said something to him?

THE WITNESS: No.

THE COURT: Did you say anything to him or do anything that would have angered him as far as you know?

THE WITNESS: The only time I said something, I said about the gun.

THE COURT: What did you say about the gun?

THE WITNESS: "Quit playing with the gun like that."

THE COURT: "Quit playing with the gun like that."

THE WITNESS: Correct.

THE COURT: And why did you tell him quit playing with the gun like that?

THE WITNESS: Somebody mess around and get shot.

THE COURT: Someone could get hurt, okay. And when you said this to him, how far away from him were you?

THE WITNESS: About ten feet.

THE COURT: About ten feet, like when the assistant prosecutor went up? Okay. What can you -- demonstrate for us in some way, shape or form how he was playing with this gun. Could you stand up and show the jury? Don't talk now. Just demonstrate with your own hand as to how he was playing with it. Okay, so he was turning his hand from left to right or palm down to palm up, things like that?

THE WITNESS: Yes.

THE COURT: And this handgun, can you describe this handgun to us? Do you know what the difference between a revolver and a semiautomatic?

THE WITNESS: It was a nine millimeter.

THE COURT: It was a nine millimeter semiautomatic, right?

THE WITNESS: Correct.

THE COURT: Okay. Have you ever fired a handgun?

THE WITNESS: No.

THE COURT: A handgun -- well, let me rephrase that. Okay, so this argument took place and he's playing around with this gun twisting in his hand left to right. What was the conversation about that you had that this handgun came out to begin with?

THE WITNESS: Can you repeat that one more time?

THE COURT: In other words, what were you talking about when Mr. Chatman pulled this handgun? I mean did he pull it out of his pants pocket, a jacket pocket or a shirt pocket or something?

THE WITNESS: No, he just had it in his hand. He had it in his hand walking around the house.

THE COURT: He had it in his hand walking around the house?

THE WITNESS: Correct.

THE COURT: Okay. When you saw this --well, not only that, but when you saw this hand gun, why didn't you leave?

THE WITNESS: Wasn't thinking, Your Honor. I was over there visiting a friend, a good friend of mine. Just wasn't thinking.

THE COURT: You weren't thinking. All right, just look at the jury now. Tell them.

THE WITNESS: I just wasn't thinking. I should have left. I wasn't thinking.

THE COURT: Okay. Did you ever hit Mr. Chatman?

THE WITNESS: No.

THE COURT: Did you ever grab anything --well, you heard what other people had said to you, huh?

THE WITNESS: Correct.

THE COURT: Okay. Do you remember ever grabbing a chair or anything?

THE WITNESS: No.

THE COURT: Did you lay any hands on Mr. Chatman at all?

THE WITNESS: No.

THE COURT: And when you were shot, you were standing?

THE WITNESS: Correct.

THE COURT: And you were about how far away from Mr. Chatman?

THE WITNESS: About ten feet.

THE COURT: And he had his arm pointed directly at your head?

THE WITNESS: Correct.

THE COURT: Do you know what happened to Mr. Chatman after you were shot?

THE WITNESS: Jumped up-- I was laying on the ground, he jumped over me and ran out the door.

THE COURT: Ran out the door?

THE WITNESS: Correct, front door.

THE COURT: Okay. How many times were you shot?

THE WITNESS: One.

THE COURT: One time?

THE WITNESS: Correct.

THE COURT: When is the next time you saw Mr. Chatman?

THE WITNESS: I didn't.

THE COURT: Well, you saw him at some point in time. You saw him at the preliminary examination, right?

THE WITNESS: Oh, yeah, yeah.

THE COURT: Okay. Did you see him at anytime from the time of the shooting up until the time the preliminary examination was conducted?

THE WITNESS: No.

THE COURT: Now you say you gave a statement to the police, right?

THE WITNESS: Correct.

THE COURT: Was this after you had been in the hospital for a couple days?

THE WITNESS: Yes, I was in the hospital.

THE COURT: How long were you in the hospital?

THE WITNESS: Seven days.

THE COURT: And approximately how long after this shooting took place did the police speak to you?

THE WITNESS: After the shooting you said?

THE COURT: Yes.

THE WITNESS: A few days later.

THE COURT: A couple days later. All right, now, the statement that was given to the police was actually an interview, in other words, they asked you questions, and you gave them answers?

THE WITNESS: Correct.

THE COURT: Okay. Did you write out the statement or did the police officer write out the statement?

THE WITNESS: I couldn't really write because my hand was --

THE COURT: And are you left-handed or right-handed?

THE WITNESS: Left.

THE COURT: You're left-handed. Have you been able to do anything with that left hand since this shooting?

THE WITNESS: No. (TR 2 at 48-56)

After asking Lawless whether Mike had a weapon, the trial judge asked, "So the only person that had a weapon in this kitchen was Mr. Chatman?" In its brief on appeal, Mr. Chatman asserted that the prosecutor questioned Mr. Lawless in this regard and no clarification was necessary. The trial judge unnecessarily amplified the People's theory of the case, as the judge essentially testified that "the only person that had a weapon in this kitchen was Mr. Chatman?" This statement is based on pure speculation, unless it was

established that Mr. Lawless conducted searches of the occupants. The judge's questions also began with the assumption that Lawless's testimony was the truth - "And how did it escalate to the point to where he wound up slapping you? . . . And when he slapped you, what were you saying to him?" Whether or not Lawless was slapped was a question for the jury, not a conclusion for the judge to make. The judge asked Lawless if he had ever fired a weapon. This irrelevant question permitted Lawless to appear to be an angel. The judge even went so far as to lead Mr. Lawless to explain that he didn't actually write out his statement to the police, as if he were giving Lawless cover for any inconsistencies.

Because Mr. Chatman admitted that he shot Mr. Lawless with the gun that was entered into evidence, the trial revolved around Mr. Chatman's intent -whether he acted in self-defense and whether or not the shooting was an accident. Mr. Chatman asserted that while trial judges are permitted to ask questions to clarify matters, the trial judge's questioning went far beyond that role. There was no indication that there was any confusion. The case essentially boiled down to a contest between Lawless's and Chatman's credibility. The judge's questions served to bolster Mr. Lawless's version of the event. Further, the questioning was decidedly one-sided. The judge declined to question Mr. Lawless with regard to his inebriated state and his lack of recollection with regard to whether he threatened Mr. Chatman and whether the gun went off accidentally.

In finding that the judge's questioning was improper, after considering the totality of the circumstances, the Court of Appeals stated that:

Like in *Stevens*, the judge "interjected himself into direct examination and engaged in pointed cross-examination." 498 Mich. at 248. Save the one clarifying question regarding the duration of the argument between Lawless and defendant, the remainder of the judge's questioning was repetitive of the prosecution's direct. The tone of the judge with this witness could not be gauged from the transcript. Through the judge's questioning, the jury again heard that Lawless was unarmed, slapped by defendant and had no memory of picking up a chair. The judge also had Lawless testify multiple times to the distance between himself and defendant, indicating that Lawless did not approach or charge at defendant. The judge unnecessarily elicited that Lawless himself had never fired a gun in his life. A review of the transcript depicts that Lawless's testimony was not complex and did not substantiate

judicial intervention. Given the undisputed facts and two-day length of the trial, the judge's questions worked to highlight the prosecution's theory of the case. (*Chatman*, slip opinion at 5).

The trial court's analysis of the judge's intervention considered all of the pertinent factors in light of the circumstances presented in this case.

The Trial Judge's Questioning of Lumsie Fisher

Similarly, after the prosecution was through questioning Lumsie Fisher, the trial judge asked him whether Mr. Lawless had any weapon when he saw him on the floor. Mr. Fischer responded "None whatsoever." The trial court stated "Look at the jury and tell them." Fisher repeated, "None whatsoever." The judge then asked "Did anybody else that you could tell have any weapon in that kitchen?" He responded "At the time, no." The judge then asked, "But when you went outside and you saw Mr. Chatman run by you, I think you said 19 feet away from you, he had a weapon?" Fisher responded "He had a weapon." (TR 2 at 73-74).

It appeared to be a matter of importance for the trial trial judge to reinforce his belief that Mr. Chatman was the only person with a gun. Again, this was not a complex case and this intervention was completely unnecessary. Further, Fisher's testimony was based upon speculation and was irrelevant as well. There was no suggestion that Chatman fired a gun because Lawless was armed. Whether intentional or not, the effect of this questioning was to paint an unflattering portrait of Chatman. In finding that the trial judge's questioning was improper, the Court of Appeals stated that:

Defendant also challenges the trial judge's questioning of Reverend Fisher, an individual present in the Mitchell home during the incident between Lawless and defendant. The judge also asked Reverend Fisher whether he saw Lawless or anyone else aside from defendant with a weapon on the day of the incident. Although the judge's questioning was brief, it was improper. Again, "the central object of judicial questioning should be to clarify." [*Stevens* at 173]. Defendant admitted he had a gun. There was no basis for the trial judge to intervene in this witness's testimony. The only contested issue in this case was whether defendant shot Lawless unprovoked or in self-defense, and the question of who possessed weapons in the kitchen prior to the incident, while relevant, was not so difficult for the jury to discern that it required clarification from the judge. Lawless was the first witness to testify

for the prosecution and testified to only defendant having a weapon. Asking the same questions to Reverend Fisher only reinforced Lawless's status as an unarmed victim and the prosecution's theory of the case. (*Chatman*, slip opinion at 5).

The Trial Judge's Questioning of Detective Lieutenant Nicole Bock

Detective Bock matched the fingerprints from the gun and magazine. Because she only was provided with SID numbers, it was not clear at that point that the prints on the gun were associated with a name that was actually an alias that Chatman used. The trial judge apparently believed it was necessary to make it clear that Chatman's prints were on the gun and magazine.

THE COURT: So these matches that you found of the right index finger and left index finger, they matched whom?

THE WITNESS: So we retrieve our fingerprint cards --

THE COURT: They matched whom?

THE WITNESS: The SID number --

THE COURT: Just look at the jury, please.

THE WITNESS: The SID number 2128148T as in Tom, which on the fingerprint card indicated the name of Ryan Reynolds.

THE COURT: Were you given a fingerprint card of the defendant in this case, Ryan Chatman?

THE WITNESS: I did not retrieve the fingerprint card from the database in that name. I simply searched the database based on that state ID number and retrieved a fingerprint card that I could conduct a comparison with. In this particular case the latent prints were very clear, so I only needed to use one fingerprint card, and the name on that particular fingerprint card that I used was the name of Ryan Reynolds.

THE COURT: I understand and I don't understand. Explain to me exactly what you just said. Were you ever provided a fingerprint card for the defendant in this case, Ryan Chatman, not Ryan Reynolds?

THE WITNESS: No. However, I was provided a state ID number. So the fingerprint cards are entered into the database based on the state ID number. Could this particular individual have 15 different fingerprint cards all under a different name? Yes. However the state ID number would remain consistent through

all of those fingerprint cards. I only retrieved the one fingerprint card from the database, and the one fingerprint card that I used was the name of Ryan Reynolds.

THE COURT: All right. So the name of Ryan Reynolds is synonymous then with Ryan Chatman?

THE WITNESS: I did not compare any other fingerprint cards for that particular state ID number to each other. So could there be another fingerprint card under that same state ID number with the name of Ryan Chatman? Yes. I just didn't use it in my comparison.

THE COURT: Did you determine as to whether or not the state identification number not only matched that of Ryan Reynolds, but also matched that of Ryan Chatman?

THE WITNESS: I do not do that in my position. When the fingerprint cards are entered in the database through live scan, they are sent electronically to Lansing, and there are ten-print examiners which will confirm the fingerprint cards are the same individual, essentially linking a particular fingerprint card to that state ID number. So even if somebody gives an alias name, the ten-print examiner will confirm that that fingerprint card belongs to that state ID number.

THE COURT: All right, so did this state identification number also match that of Ryan Chatman as well as Ryan Reynolds or no?

THE WITNESS: I wasn't asked to do any comparison to other fingerprints cards in the database. I was only asked to compare the latent prints that I developed on the items to that particular SID number. So I did not confirm that all of the other fingerprint cards in the database were under the same name.

THE COURT: So Ryan Reynolds might be somebody different than Ryan Chatman, is that what you're telling me?

THE WITNESS: In the database there could be a fingerprint card for that particular state ID number under the name of Ryan Reynolds, but also one with the same known impressions and the same state ID number under a different name.

THE COURT: That's not what I'm asking you.

MS. SHELL: Judge, at this point I think the witness is speculating.

THE COURT: I agree.

MR. PENNEY: I see where the Court is going with this. That's going to be covered by another witness. (TR2 at 137-141)

Despite Detective Bock's clear explanation that she only dealt with SID numbers, the trial judge asked "So the name of Ryan Reynolds is synonymous then with Ryan Chatman?" Bock responded that she did not make that determination, but the judge persisted, apparently believing that the prosecutor had dropped the ball. It is telling that the prosecutor stated that "I see where the Court is going with this. That's going to be covered by another witness." In our system of justice, the prosecutor should not "see where the Court is going" with its questions. It is the prosecutor's responsibility to elicit testimony. In this case, the trial judge far exceeded the scope of clarification and entered the land of advocacy.

In finding that the trial judge's questioning of Detective Bock was improper, the Court of Appeals stated that:

In this instance, the judge's questions may have begun by seeking a point of clarification regarding the fingerprint analyst's process for comparison and identification, but the questioning transgressed to advocacy for the prosecution. The tone of the trial judge in questioning this witness appears argumentative. Detective Bock was not evasive. [*Stevens* at 175–176]. She was clear in her testimony that it was not her job to connect fingerprints with specific individuals. The judge continued to prod however, and later when unsatisfied, accused the witness of speculating. It is apparent from the judge's line of questioning that the judge sought to prove that the state ID number used to identify certain fingerprints taken from the gun belonged to the defendant. It was improper for the judge to endeavor to make this point for the prosecution. While this was a point for the prosecution to elicit, regardless, there was little to gain from the conclusion, outside of a demonstration of guilt, when the possession and discharge of the gun, as well as injury to the victim were admitted.

The Court of Appeals Ruling

The Court of Appeals held that the trial judge's questioning of witnesses constituted plain error and pierced the veil of judicial impartiality warranting reversal of defendant's convictions and a new trial. In reaching its decision, the Court stated that:

The judge's questioning was unnecessary, reinforcing and biased in favor of the prosecution. We conclude that the judge's interference constituted plain error.

We also conclude that the plain error affected defendant's substantial rights. *Carines*, 460 Mich. at 763–764. Independent of defendant's actual innocence,

the judge's questioning seriously affected the fairness of the trial. *Id.* Issues of credibility, *People v Lemmon*, 456 Mich. 625, 637; 576 NW2d 129 (1988), and whether a defendant acted in self-defense, *People v Prather*, 121 Mich.App 324, 330; 328 NW2d 556(1982), are questions of fact for the jury to decide. The competing accounts of Lawless and defendant made the determination of guilt turn on whose version was more credible. Defendant's self-defense theory, if successful, relied on the jury accepting that Lawless was the aggressor. Lawless's testimony supported the possibility. The judge's questions however, suggested that the defense theory was false. They highlighted to the jury Lawless's previous answers that he was unarmed, that defendant was the aggressor and that he had not encroached any less than ten feet toward defendant. Diametric to defendant, Lawless was positioned as concerned about gun safety, the safety of others and as someone who had never fired a gun. The judge's questions also touched on issues that would have given rise to reasonable doubt in the minds of the jury, namely Lawless's intoxication and failure to flee when defendant brandished the gun. Reversal is warranted “ ‘[w]hen the trial judge's questions or comments were such as to place his great influence on one side or the other in relation to issues which our law leaves to jury verdict.’ ” *Id.* at 177 (citation omitted).

Considering the factors enunciated in *Stevens* [*sic*], the court's questioning of Lawless demonstrated the appearance of advocacy for the prosecution. Considering the totality of the circumstances, we conclude that the judge's questioning pierced the veil of judicial impartiality warranting reversal of defendant's convictions and a new trial. *Id.* at 164. (*Chatman*, slip opinion at 7-8)

The Court of Appeals decision cannot be considered clearly erroneous by any standards. The opinion demonstrates that the Court of Appeals carefully considered the judge's questioning of the witnesses and applied the standards set forth in *Stevens*. Consistent with *Stevens*, the ultimate effect of a judge's intervention is a case-by-case determination. As such, the opinion does not conflict with other decisions by this Court or the Court of Appeals and will not cause material injustice. Further, application of the specific facts of this case to the *Stevens* factors does not present an issue of significance to the jurisdiction of the state

The People's Argument That This Court Went Too Far In *Stevens* Has Been Waived And Is Inapplicable To This Case.

The People argue that this Court went “too far” in *Stevens*, by ruling that a finding of judicial misconduct warrants automatic reversal. As an initial matter, the Court of Appeals in the present case did not take the position that reversal was automatically warranted. Instead, the Court viewed the totality of the circumstances under a plain error

standard of review and determined that Mr. Chatman was denied a fair trial because the trial judge, through his questioning of witnesses, demonstrated bias to the jurors.

The People extensively argue that a trial judge's questioning does not amount to structural error warranting automatic reversal, and that even when improper questioning occurs, it should be subjected to a harmless error analysis. The majority opinion in the present case never mentions the phrase "structural error" or "automatic reversal." The singular mention of the phrase "structural error" occurs in Judge Gadola's partial dissent where he references a passage from this Court's decision in *Stevens*. Judge Gadola's dissent does not implicate the issue that the People seek to raise in this case. Judge Gadola merely disagreed with the majority's conclusion after consideration of the totality of the circumstances, writing that:

The ultimate question on review is whether the trial judge improperly influenced the jury by creating an appearance of advocacy or partiality under the totality of the circumstances. I do not believe that it is "clear or obvious" that this occurred in this case, and thus plain error did not occur. *Chatman*, slip opinion at 10 (citation omitted).

In Mr. Chatman's Brief on Appeal, *he did not assert* that automatic reversal was the remedy in this case. Chatman argued that because his assignment of error was unpreserved, his claim is reviewed for plain error affecting substantial rights. For its part, the People *did not argue* in their response that *Stevens* was wrongly decided and/or that the Court of Appeals should not engage in automatic reversal due to a structural error. Instead, the People merely argued that the trial judge did nothing wrong and asserted that "[t]he inquiry as to plain error here stops at the first prong: defendant has shown no error, let alone error that is plain or obvious." (Appellant's Brief at 15).

In *Swartz v Dow Chemical Co*, 414 Mich 433, 446 (1982) this Court stated that:

The general rule is that a question may not be raised for the first time on appeal to this Court. *Dation v Ford Motor Co.*, 314 Mich. 152, 22 N.W.2d 252 (1946). This rule is not fashioned in stone, but when a consideration of a claim is not necessary for a proper determination of a case, it will be applied. See *Turner v. Consumers Power Co.*, 376 Mich. 188, 191-192, 136 N.W.2d 1 (1965). See also *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 517, 134 N.W.2d 637 (1965) (Adams, J., dissenting)

The claim that the People seek to raise in this Court is not necessary to determine whether the Court of Appeals decision was clearly erroneous. The Court of Appeals considered the totality of the circumstances and found that the trial court committed plain error which affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence. When the People assert that “defendant cannot meet the standard of plain error for reversal” in this case, the People cite a myriad of foreign decisions, but do not show how the Court of Appeals’ decision in this case was clearly erroneous, let alone worthy of review by this Court. The People agree that the Court of Appeals employed the proper standard of review, but speculate that the Court “essentially reversed because it found error.” (Appellant’s Brief at 28-32). The prosecutor’s mere disagreement with the Court of Appeals decision does not present an issue that should be reviewed by this Court. The prosecutor’s desire to attack *Stevens* must await a case that actually involves the issues that the prosecutor is intent on addressing.

This application should be denied because the Court of Appeals' opinion is not clearly erroneous, it does not conflict with other decisions by this Court or the Court of Appeals, and it will not cause material injustice. Further, *this case* does not present an issue of significance to the jurisdiction of the state. MCR 7.302(B).

RELIEF REQUESTED

For the reasons set forth in this brief, Defendant-Appellee requests that this Court deny the People’s application for leave to appeal.

Respectfully submitted,

/s/Gary David Strauss P48673

PROOF OF SERVICE

Gary D. Strauss, states that on February 20, 2017, he served a copy of the Brief on Appeal and Proof of Service upon a representative of the Wayne County Prosecutor’s office, 1441 St Antoine, 12th Floor, Detroit Michigan 48226 via the True Filing System.

/s/Gary David Strauss